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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 (SAN JOSE DIVISION)
12

13 SENTIUS INTERNATIONAL, LLC,
14 Plaintiff,
15 v.
16 MICROSOFT CORPORATION,
17 Defendant.

18 AND RELATED COUNTERCLAIMS
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Case No. 5:13-cv-00825 PSG

**DEFENDANT MICROSOFT
CORPORATION'S DAUBERT
MOTION TO EXCLUDE
TESTIMONY OF SENTIUS' SURVEY
EXPERT DR. WILLIAM WECKER**

DATE: January 13, 2015
TIME: 10:00 a.m.
JUDGE: Hon. Paul S. Grewal

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1 PLEASE TAKE NOTICE that on January 13, 2015, 10:00 a.m., Defendant Microsoft
2 Corporation (“Microsoft”) will and hereby does move the Court to exclude the testimony of
3 Sentius International, LLC’s (“Sentius”) survey expert Dr. William Wecker.

4 **I. INTRODUCTION**

5 In support of its damages theory, Plaintiff Sentius International, LLC (“Sentius”) relies
6 heavily on an on-line survey conducted at the direction of one of its experts, Dr. William Wecker.
7 Dr. Wecker concludes from his survey results that a sizable percentage of Microsoft’s customers
8 would not have purchased the Office suite of products if the applications in that suite lacked the
9 background spell- and grammar-checking features that are accused of infringement in this case.
10 For those who would nonetheless have bought Office, Dr. Wecker concludes that they would have
11 paid a sizable amount to have those features included. Sentius’ damages expert, Mr. Robert Mills,
12 relies on these results as mathematical certainties, concluding from the first set of figures that
13 Microsoft would have lost a billion dollars in profit had it not included the accused features in
14 Office, and so would have gladly paid about a quarter of that to Sentius.

15 In short, Mr. Mills premises a commercial analysis on Dr. Wecker’s survey data, one that
16 ostensibly tracks a commercial decision-making process that would supposedly have led from
17 those survey results to Microsoft cutting a check to Sentius for well over one hundred million
18 dollars.

19 Dr. Wecker’s survey cannot bear this weight. Dr. Wecker cannot recall ever designing a
20 survey to evaluate individuals’ preferences or opinions, in a commercial, non-litigation setting,
21 and it shows in his survey for this case. Among the problems with the survey detailed below,
22 Dr. Wecker failed to ask any questions that would probe the extent to which respondents care
23 about the specific aspects of the spell- and grammar-check features that Sentius alleges infringes
24 its claims (such as the purported use of a “look-up table” with “links”). The Sentius reissue
25 patents are directed to a very specific implementation that facilitates the retrieval of reference
26 information, not to spell- or grammar-checking generally. Notably, Sentius’ own technical expert
27 has acknowledged that there is at least one non-infringing way to implement the accused spell-
28 and grammar-checking features. For the questions he did ask, Dr. Wecker employed a

1 hypothetical approach that singled out the accused features to the exclusion of the thousands of
2 others in Office. With the deck thus stacked, it is little wonder that respondents expressed a
3 preference for those features. That is a well-known phenomenon called “hypothetical bias,” a
4 common-sense phenomenon wherein people asked to focus on one particular feature in a product
5 will naturally overstate the importance of that feature. To reduce this bias, multi-feature products
6 are conventionally surveyed using conjoint techniques—and even those techniques have severe
7 limitations when the products at issue have the thousands of features that Microsoft Office
8 products have.

9 In addition to those problems, Dr. Wecker did not even conduct a dedicated survey. His
10 survey was instead included amongst an unknown number of others, in what is known in the field
11 as an “omnibus” survey. It is a well-known shortcoming of omnibus surveys that questions asked
12 in one survey can materially influence responses given in others. This too fails to follow generally
13 accepted survey methodology, which calls for a dedicated survey where there is any material
14 commercial decision hinging on the survey results. Compounding the omnibus survey problem,
15 Dr. Wecker failed to utilize any quality control measures. This too is the standard in survey
16 methodology. There are well-established techniques to determine if respondents are “racing”
17 through the survey, not reading the questions carefully (if at all), or otherwise failing to engage in
18 the survey in a meaningful and thoughtful manner. Dr. Wecker employed none of these
19 techniques, and he consequently has no way to determine if any of the respondents took any of the
20 questions in his survey seriously.

21 In sum, Dr. Wecker’s survey failed to ask the right questions, and failed to apply
22 acceptable survey methodology. No meaningful use can be made of his survey results for any
23 purpose germane to this case, and certainly no conclusions can be drawn from those results that
24 carry one hundred million dollar, real-world commercial consequences, as Sentius contends. The
25 survey and Dr. Wecker’s testimony should be excluded in their entirety.

26 **II. STATEMENT OF FACTS**

27 Dr. Wecker submitted an expert report on behalf of Sentius concerning a survey that
28 ostensibly reveals the extent to which Microsoft’s customers would not have purchased Microsoft

Office if the accused spell- and grammar-check features were absent, and if they would have nonetheless still purchased the product, how much extra they would have paid for those features (the “Wecker Report”).¹ The opinions offered in the Wecker Report in turn serve a critical predicate role for the damages analysis offered by Sentius’ damages expert, Mr. Mills.

Dr. Wecker has never before conducted a commercial survey to assess what, if anything, a consumer would be willing to pay for a good, service, or feature.² His survey for this case (“Wecker Survey”) was an on-line survey conducted by a third party at Dr. Wecker’s request.³ The Wecker Survey was a part of an omnibus survey, meaning that the same panel of respondents were asked questions from multiple different surveys, both before and after the Wecker Survey.⁴ When Dr. Wecker formed his opinions, he did not know what questions were asked before his survey (he obtained that information the day before his deposition), and to this day does not know how many other surveys made up the omnibus survey.⁵

Dr. Wecker states that his survey was “aimed at users and purchasers of Microsoft Office computer software” and asked such users “about their use of Microsoft’s spelling and grammar check methods available in components of Microsoft’s Office and the value they placed on those capabilities.”⁶ The Wecker Survey directly asked the survey participants open-ended questions about their willingness-to-pay (“WTP”) extra for what Dr. Wecker described as Microsoft’s “check spelling as you type” and “check grammar errors as you type” features.⁷ Dr. Wecker acknowledged that responses to such WTP questions tend to “overstate consumers’ ‘true’ willingness to pay” “thus requiring a calibration factor to adjust for the overestimation.”⁸

The Wecker Survey described the “check spelling as you type” feature as follows, referencing a series of included screenshots: “As you type text, the software identifies words that

¹ Ex. J, Expert Report of William E. Wecker, September 8, 2014. All references to “Ex.” are to exhibits attached to the Declaration of Jonathan J. Lamberson.

² Ex. K, Wecker Depo Tr. (ROUGH) at 35:14-19.

³ Ex. J at paras. 7-11.

⁴ Ex. L, 9/16/2014 Sentius Email.

⁵ Ex. K at 90:14-22.

⁶ Ex. J at para. 8.

⁷ *Id.* at para. 13.

⁸ *Id.* at para. 14.

1 may not be spelled correctly and marks them with a red-squiggly underline. When you ‘right
 2 click’ (‘control-click’ on some Apple Macintosh computers) on a marked word, a drop down
 3 menu is displayed with a list of alternative words and other options to choose from, as shown
 4 below.”⁹ As an additional feature of Microsoft Office, the Wecker Survey described a “user-
 5 initiated” spell checker option: “The user-initiated spell checker option does not mark misspelled
 6 words as you type with a red-squiggly underline, but instead identifies words that may not be
 7 spelled correctly when, for example, you select Spelling & Grammar from the Review menu in
 8 Word (or select Spelling and Grammar from the Tools menu on an Apple Macintosh computer), as
 9 shown below.”¹⁰

10 Similarly, with respect to grammar checking, the Wecker Survey described “check
 11 grammar errors as you type” as follows: “As you type text, the software identifies words or
 12 phrases that may contain grammar errors (or inconsistent formatting) and marks them with a green
 13 or blue squiggly underline. When you ‘right click’ (‘control click’ on some Apple Macintosh
 14 computers) on a marked word or phrase, a drop down menu is displayed with a list of alternatives
 15 and other options to choose from, as shown below.”¹¹ The Wecker Survey described an additional
 16 Microsoft Office feature, a “user-initiated grammar check,” as an “option [that] does not mark
 17 grammar errors (or inconsistent formatting) as you type with a green or blue squiggly underline,
 18 but instead identifies words or phrases that may contain grammar errors (or inconsistent
 19 formatting) when, for example, you select Spelling & Grammar from the Review menu in Word
 20 (or select Spelling and Grammar from the Tools menu on an Apple Macintosh computer), as
 21 shown below.”¹²

22 The two reissue patents (U.S. Pat. Nos. RE40,731 and RE43,633) asserted by Sentius in
 23 this case relate to “indexing displayed elements. More particularly, the present invention relates to
 24 a novel indexing scheme that is useful in such applications as learning a foreign language, for
 25

26 ⁹ *Id.* at Attachment E at page E.2.

27 ¹⁰ *Id.* at Attachment E at page E.4.

28 ¹¹ *Id.* at Attachment E at page E.9.

¹² *Id.* at Attachment E at page E.11.

1 example a language based upon an ideographic alphabet, such as Japanese.”¹³ Sentius in its
 2 tutorial stated that the “starting and end point addresses for [linked] words and phrases [in a
 3 document] and their associated links are recorded in a *look-up table* and executed to retrieve
 4 additional materials for display in a pop-up window in response to a user input.”¹⁴

5 Neither reissue patent mentions spell checking or grammar checking.¹⁵ Marc Bookman, a
 6 named inventor on both reissue patents, acknowledged that spell checking and grammar checking
 7 have been around for a long time,¹⁶ and Sentius has not alleged that all spell or grammar checking
 8 infringe. The other named inventor on the reissue patents, Brian Yamanaka, acknowledged that
 9 there are multiple ways to implement a spell checking system, *e.g.*, one implementation using a
 10 look-up “table that ... had a link, a pointer, to the correct spelling” and another where “you
 11 wouldn’t maintain links to the correct spelling.”¹⁷ Sentius’ technical expert, Dr. Vijay Madiseti,
 12 acknowledged that there is at least one non-infringing way to implement the accused spell- and
 13 grammar-checking functionalities in Microsoft Office.¹⁸ None of the questions posed in the
 14 Wecker Survey sought to probe respondents for the supposed criticality of, or value of, the
 15 specific aspects of the spell and grammar check features that are alleged to infringe Sentius’
 16 patents—a “look-up table” with “links” to external content.

17 **III. STATEMENT OF LAW**

18 Federal Rule of Evidence 702 allows expert testimony only if it is based on “scientific,
 19 technical, or other specialized knowledge” by a qualified expert and if it “will help the trier of fact
 20 to understand the evidence or determine a fact in issue.” Fed. R. Evid. 702. The Supreme Court
 21 has assigned “to the trial judge the task of ensuring that an expert’s testimony both rests on a
 22 reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharms., Inc.*,
 23 509 U.S. 579, 597 (1993).

24
 25
 26 ¹³ US. Pat. No RE40,731 at 1:15-20; U.S. Pat. No. RE43,633 at 1:27-31.

27 ¹⁴ Ex. M, Sentius Tutorial at page 22 (emphasis added).

28 ¹⁵ See US. Pat. Nos. RE40,731 and RE43,633.

¹⁶ Ex. E, 5/30/2014 Bookman Depo. Tr. at 328:24-329:5.

¹⁷ Ex. F, 6/20/2014 Yamanaka Depo. Tr. at 104:20-106:22.

¹⁸ Ex. I, 11/24/2014 Madiseti Depo. Tr. at 142:16-143:7.

1 A party proffering expert testimony has the burden to establish by a preponderance of the
 2 evidence that such testimony is sufficiently reliable. *See id.* at 592 n.10. Expert testimony is
 3 sufficiently reliable only if it (1) is based on sufficient facts or data; (2) is the product of reliable
 4 principles and methods; and (3) applies the principles and methods reliably to the facts. *See Fed.*
 5 *R. Evid.* 702; *Daubert*, 509 U.S. at 591-592. As “gatekeeper,” the court must exclude expert
 6 testimony that “is irrelevant or does not result from the application of reliable methodologies or
 7 theories to the facts of the case.” *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1391 (Fed.
 8 Cir. 2003).

9 The admissibility of survey evidence is governed by *Daubert*. *Southland Farms v. Stover*
 10 *Seed Co.*, 108 F.3d 1134, 1143 n.8 (9th Cir. 1997). Serious flaws in a survey will make reliance
 11 on that survey unreasonable. *See Icon Enters. Int’l, Inc. v. American Products Co.*, 2004 WL
 12 5644805, at *22 (C.D. Cal. Oct. 7, 2004). To be admissible, evidence, including survey evidence,
 13 considered in a reasonable royalty analysis must be tied to the patented invention. *See Fractus,*
 14 *S.A. v. Samsung*, 2011 WL 7563820, at *1 (E.D. Tex. Apr. 29, 2011) (quoting *ResQNet.com, Inc.*
 15 *v. Lansa*, 594 F.3d 860, 869 (Fed. Cir. 2010) (“Survey evidence purportedly demonstrating the
 16 value of [a product feature] not tied directly to Plaintiff’s technology confuses the issues and must
 17 be excluded. Allowing the jury to hear such evidence not tied to the claimed invention risks
 18 ‘compensation for infringement [that] punishes beyond the reach of the statute.’ Indeed,
 19 admissible expert testimony must ‘carefully tie proof of damages to the claimed invention’s
 20 footprint in the market place.’”)).

21 “Treatment of surveys is a two-step process. First, is the survey admissible? That is, is
 22 there a proper foundation for admissibility, and is it relevant and conducted according to accepted
 23 principles? This threshold question may be determined by the judge. Once the survey is admitted,
 24 however, follow-on issues of methodology, survey design, reliability, the experience and
 25 reputation of the expert, critique of conclusions, and the like go to the weight of the survey rather
 26 than its admissibility.” *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1263 (9th Cir.
 27 2001) (internal citations omitted).

Further, even if expert testimony or survey evidence is relevant, Federal Rule of Evidence 403 requires the court to exclude such relevant evidence “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

Patent damages must be based on sound economic principles and reliable data. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011); *ResQNet.com Inc. v. Lansa, Inc.* 594 F.3d 860 (Fed. Cir. 2010); *Lucent Tech. v. Gateway*, 580 F.3d 1301 (Fed. Cir. 2009). The hypothetical negotiation must account for factors that would have affected a real-world negotiation, including potential alternatives to the patent. *Uniloc*, 632 F.3d at 1313.

IV. ARGUMENT

A. The Wecker Survey Should Be Excluded Because the Questions It Posed Are Not Tied to the Claimed Subject Matter

As noted above, the Wecker Survey asked respondents about their willingness to purchase products that lacked, and their willingness to pay extra for, Microsoft’s “check spelling as you type” and “check grammar errors as you type” features.¹⁹ These are simply the wrong questions to ask. Sentius did not invent background spell or grammar checking. Indeed, the inventors of the patents-in-suit acknowledge that there are multiple ways to link or look-up content,²⁰ and multiple ways to implement a spell checking system.²¹ Additionally, Microsoft has identified several alternative approaches for implementing background spell and grammar checking that are well outside what Sentius contends its claims cover.²² One such alternative has already been implemented for background spell-check, and Microsoft currently anticipates releasing it to some Office customers in the next one-to-two months.²³ Sentius’ technical expert, Dr. Madisetti, acknowledged in his deposition that he was not alleging this alternative infringed the Sentius

¹⁹ Ex. J at para. 13.

²⁰ See Ex. D, 5/29/2014 Bookman Depo. Tr. at 126:17-130:25.

²¹ See Ex. F at 104:20-106:22.

²² Ex. N, Expert Report of Daniel A. Menasce Regarding Non-Infringement, at paras. 656-665.

²³ *Id.* at para. 660.

1 reissue patents.²⁴ His opinion was that this alternative would allegedly not have been “acceptable”
 2 for a variety of reasons.²⁵ Notably, nothing in the Wecker survey asks any questions about the
 3 “acceptability” of this or any other alternative design for implementing background spell- or
 4 grammar-checking.

5 The central defect of the Wecker Survey is thus its failure to pose questions that probe
 6 respondents for their preference for, and perceived value of, the specific aspects of Microsoft’s
 7 background spell- and grammar-check features that are alleged to infringe the patents-in-suit.
 8 Sentius contends that only Microsoft’s alleged use of a look-up table, and its performance of
 9 certain steps in the order required by the claims, infringes. A proper survey would have explored
 10 whether respondents have any preference for spell and grammar check features implemented in
 11 this specific way, not the features in general.²⁶

12 “[T]he trial court must carefully tie proof of damages to the claimed invention’s footprint
 13 in the market place.” *ResQNet.com* at 869. “Survey evidence purportedly demonstrating the
 14 value of [a product feature] not tied directly to Plaintiff’s technology confuses the issues and must
 15 be excluded.” *Fractus*, 2011 WL 7563820 at *1 (excluding survey evidence where the subject
 16 questions of the survey were directed to the value of internal antennas and not directed tied to the
 17 patented technology of one type of internal antenna that purportedly provides advantages such as
 18 multiband functionality and reduced size). “Allowing the jury to hear such evidence not tied to
 19 the claimed invention risks ‘compensation for infringement [that] punishes beyond the reach of the
 20 statute.’” *Id.* (quoting *ResQNet.com*, 594 F.3d at 869). “Indeed, admissible expert testimony must
 21 ‘carefully tie proof of damages to the claimed invention’s footprint in the market place.’” *Id.*
 22 Here, in accord with the Federal Circuit in *ResQNet.com* and similar to *Fractus*, “the surveys are
 23 not tied to the alleged advantageous technical characteristics of the patents-in-suit Put another
 24 way, the surveys do not measure how consumers value the purported advantages provided by
 25 Plaintiff’s technology.” *Fractus*, 2011 WL 7563820, at *1.

26 _____
 27 ²⁴ Ex. I, 11/24/2014 Madisetti Depo. Tr. at 142:16-143:7.

28 ²⁵ *Id.*

²⁶ D.I. 66, Court’s Claim Construction Order, requiring that the steps of the reissue patent method claims, the only remaining asserted claims, “must be performed in the orders written.”

1 Judge Koh confronted a similar issue in a challenge to Apple's survey in *Apple, Inc. v.*
 2 *Samsung Elects. Co., Ltd.*, 2014 WL 794328 (N.D. Cal. Feb. 25, 2014). While ultimately
 3 rejecting the defendant's *Daubert* challenge, that was because the survey questions in that case
 4 *were* directly tied to the particular claim feature at issue, which concerned a particular background
 5 synchronization component. *Id.* at *19. While the claims required two additional background
 6 synchronization components that were not probed in the survey, *id.* at *18, the unrebutted
 7 evidence there showed that the defendant "could not have implemented a single-component non-
 8 infringing alternative." *Id.* at *19. "Accordingly, Apple can argue that, for Samsung consumers,
 9 the technical limitations of Samsung's devices rendered the relevant choice to be between a device
 10 with background synchronization and a device without background synchronization (not a choice
 11 between three-component background synchronization and one-component background
 12 synchronization). Given the apparent limitations of Samsung's devices, the Court concludes that
 13 Dr. Hauser's [Apple's survey expert] description of claim 20 of the '414 Patent was not
 14 improper." *Id.*

15 In so holding, Judge Koh cautioned against survey questions that stray too far from the
 16 particulars of the claims alleged to be infringed: "At some point, a description of a patent in a
 17 survey may vary so much from what is claimed that the survey no longer 'relate[s] to any issue in
 18 the case' and is 'not relevant and, ergo, non-helpful.'" *Id.* at *18 (quoting *Daubert*, 509 U.S. at
 19 591); see *Icon Enterprises Int'l, Inc.*, 2004 WL 5644805, at *22 ("However, 'serious flaws in a
 20 survey will make any reliance on that survey unreasonable.'") (citing *Scott Fetzer Co. v. House of*
 21 *Vacuums Inc.*, 381 F.3d 477, 488 (5th Cir. 2004)); *Reinsdorf v. Skechers U.S.A.*, 922 F. Supp. 2d
 22 866, 878 (C.D. Cal. 2013) (excluding a survey).

23 Given that Sentius did not invent background spell- or grammar-checking, and that the
 24 record here amply demonstrates that those features can be implemented using techniques that fall
 25 outside of what Sentius contends its claims cover, the methodology of the Wecker Survey is
 26 fatally flawed and unsound as a consequence of posing questions that are not sufficiently tied to
 27 the claimed subject matter. The Wecker Survey is thus meaningless on the issues of whether
 28 respondents would still have purchased Microsoft's products absent the specific implementation

1 details required for infringement (the claimed “look-up table”), and if so how much extra they
 2 would have paid for spell- and grammar-check features that were implemented in that particular
 3 way. The Wecker Survey and its results, the Wecker Report, and all testimony from Dr. Wecker
 4 should therefore be excluded as inadmissible under *Daubert* and Federal Rule of Evidence 702.

5 These materials should also be excluded under Fed. R. Evid. 403. *Apple*, 2014 WL
 6 794328, at *18. Rule 403 requires the court to exclude even relevant evidence “if its probative
 7 value is substantially outweighed by a danger of one or more of the following: unfair prejudice,
 8 *confusing the issues, misleading the jury*, undue delay, wasting time, or needlessly presenting
 9 cumulative evidence.” Fed. R. Evid. 403 (emphasis added). “[A]t some point, discrepancies
 10 between the scope of the patent claims and the survey questions may be so confusing to the jury as
 11 to substantially outweigh the survey’s probative value, thus requiring the Court to exclude such
 12 material under Rule 403.” *Apple, Inc.*, 2014 WL 794328, at *18; *see Citizen Fin. Grp., Inc. v.*
 13 *Citizens Nat. Bank of Evans City*, 2003 WL 24010950, at *5 (W.D. Pa. Apr. 23, 2003) (excluding
 14 a survey under Rule 403); *Arche, Inc. v. Azaleia, U.S.A., Inc.*, 882 F. Supp. 334, 336 (S.D.N.Y.
 15 1995) (excluding consumer survey under Rule 403); *Icon Enterprises Intern., Inc.*, 2004 WL
 16 5644805, at *22 (“Likewise, [i]f the flaws in the proposed survey are too great, the court may find
 17 that the probative value of the survey is substantially outweighed by the prejudice, waste of time,
 18 and confusion it will cause at trial.” (internal quotations and citation omitted)).

19 Sentius will likely argue that whether there were any available and acceptable non-
 20 infringing alternatives is a fact dispute that the jury must resolve. Such an argument misses the
 21 point. As discussed above, there is no dispute that there is at least one possible alternative
 22 implementation of the accused features that does not infringe the asserted claims.²⁷ Even
 23 assuming there is a fact dispute about whether this alternative implementation would have been
 24 *acceptable* to customers (and if so, Microsoft contends there is no genuine dispute on
 25 acceptability, given that it has already been successfully implemented), the Wecker Survey is not
 26 addressed to that dispute, and thus is not probative on the issue of acceptability. The Wecker
 27 Survey simply assumes that there are no possible alternative implementations for background
 28

spell- or grammar-checking. As discussed above, that factual predicate is unfounded and incorrect.

Because the Wecker Survey framed its questions in terms of “check spelling as you type” and “check grammar errors as you type” without tethering those questions to the claimed subject matter (a “look-up table” with “links”), not only does it have no probative value for the issues germane to this case, but it is highly likely to confuse and mislead the jury as to the alleged criticality and value of the patented technology.

Not only did Dr. Wecker fail to ask the right questions, but the “check spelling as you type” characterization that he used is materially overbroad and confusing in another respect as well. Some Microsoft Office products, such as Microsoft Word for Windows, include an “Autocorrect” function.” Autocorrect can “correct typos and misspelled words as well as to insert symbols and other pieces of text.” “AutoCorrect can also correct a misspelled word if the word is similar to a word in the main spelling checker dictionary.” The classic example is Autocorrect automatically correcting “teh” to “the.” Autocorrect can function in tandem with “check spelling as you type” and “check grammar errors as you type.”

Even though Autocorrect is not accused, the “check spelling as you type” phrasing used in the Wecker Survey is broad enough to encompass Autocorrect, and thus respondents when indicating whether they would have purchased the accused products if it lacked the “check spelling as you type” feature, and if so how much extra they would have been willing to pay for this feature, may have had the unaccused Autocorrect feature in mind. Plainly, best-practices in administering a survey requires unambiguous questions.²⁸ Courts likewise have recognized that “[a] reliable survey should avoid the use of confusing or ambiguous questions.” *Georgia-Pacific Consumer Prods. LP v. Kimberly Clark Corp.*, 2010 WL 1334714, at *5 (N.D. Ill. March, 31 2010).

²⁷ Ex. I, 11/24/2014 Madisetti Depo. Tr. at 142:16-143:7.

²⁸ Ex. O, *Basic Survey Design*, available at <http://www.nss.gov.au/nss/home.nsf/NSS/4354A8928428F834CA2571AB002479CE?opendocument> (last visited December 1, 2014) (“Questions should not be loaded, double-barreled, misleading or ambiguous, and should be directly relevant to the objectives of the survey.”).

Accordingly, the Wecker Survey and its results, the Wecker Report, and all testimony from Dr. Wecker should also be excluded as inadmissible under Federal Rule of Evidence 403.

B. The Wecker Survey Should Be Excluded Because It Is Not Based on Reliable Methodologies

1. The Wecker Survey Should be Excluded Because It Employs a Hypothetical Framework That Is Fundamentally Flawed in the Context of Products Having Thousands of Features

The accused Microsoft Office applications have, collectively, thousands of features. The Wecker Survey elevates two of those to preeminence, and asks only about those, to the exclusion of all others. Given how the deck was stacked, it is not surprising that a sizable percentage of respondents said that they would not purchase Office without the accused features—8.4% in the case of background spell check, and 7.9% in the case of background grammar check—and that respondents on average valued these features at \$2.36 and \$2.12, respectively. Mr. Mills then accepts these figures at face value, and applies the first set of figures to conclude that Microsoft would have lost \$1.5 billion in revenue if it omitted the features²⁹, and then applies the second to justify relying on the wholly unrelated *Lucent* JMOL decision to support an alleged \$0.22/unit running royalty.³⁰

Neither Mr. Mills nor Dr. Wecker identifies any authority—legal, academic, or otherwise—showing that any real world commercial decisions, let alone billion-dollar commercial decisions, have ever turned on this type of hypothetical survey that asks about two features to the exclusion of thousands of others. The generally accepted practice—and even it has serious limitations when applied to multi-thousand feature products of the type at issue here—is instead to employ a conjoint analysis:

Conjoint (trade-off) analysis is one of the most widely-used quantitative methods in Marketing Research. It is used to measure preferences for product features, to learn how changes to price affect demand for products or service, and to forecast the likely acceptance of a product if brought to market.

Rather than directly ask survey respondents what they prefer in a product, or what attributes they find most important, conjoint

²⁹ Ex. P, Expert Report of Robert Mills, Sept. 8, 2014, at para. 177.

³⁰ *Id.* at paras. 174-175.

analysis employs the more realistic context of respondents evaluating potential product profiles.³¹

That was the type of survey at issue in *Apple v. Samsung*, 2014 WL 794328 at *13:

First, Dr. Hauser presented survey respondents, who all owned an accused Samsung device, with four profiles at a time. Each profile consisted of a hypothetical smartphone, and the survey asked respondents to choose which of the four profiles they preferred. See Expert Report of John Hauser (ECF No. 1182) ¶ 85 (“Hauser Rep.”).FN6 These profiles varied the price, camera features, call initiation and screening features, input assistance features, screen size, and data accessibility features of hypothetical smartphones. *Id.* ¶ 45. The surveyed features included the patented features and “distraction features,” which were chosen because they were featured in Samsung guides and manuals. For any feature not listed (e.g., battery life), respondents were asked to assume that each profile offered the same level of functionality as their current smartphones. *Id.* ¶ 83. Each respondent chose sixteen hypothetical smartphones from sixteen sets of four profiles. *Id.* ¶ 77³²

Dr. Wecker’s failure to employ a survey technique that properly frames the two accused features in the context of the overall feature set of the software applications in which they appear, coupled with Mr. Mills’ use of the results of that survey to posit “at risk” revenues to Microsoft of over a billion dollars, fails to apply generally accepted methodology, and inevitably results in figures that are unreliably biased to favor Sentius.³³ The Wecker Survey and its results, the Wecker Report, and all testimony from Dr. Wecker should also be excluded on this basis as well.

³¹ See Ex. Q, *What is a Conjoint Analysis?*, available at <http://www.sawtoothsoftware.com/products/conjoint-choice-analysis/conjoint-analysis-software> (last visited on December 1, 2014).

³² The distorting effects from surveys that elevate particular features above others was also recognized by Judge Koh in *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 2014 WL 976898, at *15 (N.D. Cal. 2014) (“The survey also appears to have inflated the relative value of the patented features by giving much more information to respondents about the patented features than consumers in the marketplace have about those features. See Wind Decl. ¶ 56. Research has shown that ‘attention can elevate the importance of particular attributes to a level that is greater than would occur in the marketplace.’ Joel Huber, ‘What We Have Learned from 20 Years of Conjoint Research: When to Use Self-Explicated, Graded Pairs, Full Profiles or Choice Experiments,’ *Sawtooth Software Conference Proceedings 2* (1997), available at <http://www.sawtoothsoftware.com/download/techpap/whatlnd.pdf>. ‘Simply mentioning an attribute increases its importance, raising the specter of attributes appearing important that otherwise would be ignored in the market choice.’”).

³³ See Ex. R, Joel Steckel et al., *Is It Worth Anything? Using Surveys in Intellectual Property Cases*, at pages 4-6 (Conjoint analysis techniques were developed to address the limitations of direct questioning, including the artificial feature importance direct questioning can cause); Ex. S, Shankar Iyer, *Consumer Surveys and Other Market-Based Methodologies in Patent Damages*, <http://apps.americanbar.org/litigation/committees/intellectual/articles/fall2014-0914-consumer->

2. The Wecker Survey Should Be Excluded Because It Was Part of an Omnibus Survey, And No Attempt Was Made to Account for the Influence of Other Questions

Although Dr. Wecker did not disclose the fact in his report, Microsoft after receiving that report suspected that the questions that make up the Wecker Survey were part of an omnibus survey that included numerous questions from researchers other than Dr. Wecker.³⁴ Sentius later acknowledged that this was the case.

It is well known in the survey field literature that an innate flaw of an omnibus survey is the tendency of one question set to influence another question set.³⁵ Omnibus surveys have their role in marketing research, but they are “not a substitute for custom-design market research,” as is required here.³⁶ Dr. Wecker made no effort to account for the influence of the other questions in the omnibus survey. Indeed, he did not even know what those questions were until the day before his deposition. Here too, neither Dr. Wecker nor Mr. Mills has identified any authority to suggest that billion dollar commercial decisions have ever turned on survey data collected from a portion of an omnibus survey. Given this, and given Dr. Wecker’s failure to account for the effect of the other questions in the omnibus survey on the answers to his survey, the survey and Dr. Wecker’s testimony regarding it should be excluded.³⁷

surveys.html (last visited Nov. 30, 2014) (Conjoint analysis techniques were developed to minimize direct question surveys that “may improperly elevate the relevance or importance of a particular feature by focusing the respondent on that feature.”).

³⁴ See Ex. L.

³⁵ See Ex. T, Nigel Bradley, *Marketing Research: Tools and Techniques* 281, 3d ed. (“The disadvantage [of omnibus surveys] is the risk that one set of questions might be affected by other sets”); Ex. U, *Good Small Business Guide 2013: How to Start and Grow Your Own Business* 242, 7th ed. (“Before participating in the [omnibus] survey, you should check that the other topics in the survey are compatible”); Ex. V, Scottish Governmental Social Research Group: Social Science Method Series, <http://www.scotland.gov.uk/resource/doc/175356/0091407.pdf> (last visited Nov. 10, 2014) (“it is difficult to assess the impact of other questions”).

³⁶ See Ex. T at page 281.

³⁷ This failing of the Wecker Survey could have been avoided by commissioning a solo survey that only included the questions from the Wecker Survey, as explained by Dr. Colby (*see* Ex. W, Expert Report of Charles L. Colby at page 20).

3. The Wecker Survey Should be Excluded Because it Lacked Any Quality Control Measures

The Wecker Survey was conducted on-line. There was thus no direct interaction between the survey administrator and the respondents, and therefore no direct way to determine if the respondents were engaging in the substance of the survey questions. It is a well-known problem in the survey field that “it is *very difficult—if not impossible*—to get respondents to carefully read instructions and other information online This makes it difficult to perform research that depends on the respondent’s reading of a situation or product description.”³⁸ It is therefore essential that such surveys include quality control measures. “A researcher’s desire should be to remove all the [data-quality] culprits from the data set The solution is to use multiple quality-control measurements that are efficient and remove participants who fail one or more of these measurements.”³⁹ “In addition to the recruitment and panel management techniques discussed above, researchers should incorporate survey-specific practices to flag potential ‘cheater’ data to determine whether or not the panelist’s data should be removed. . . . In addition, trap questions are included within surveys to identify respondents who are not reading the questions before selecting responses, or who are using automated response methods.”⁴⁰

Despite this well-known shortcoming of on-line surveys, the Wecker Survey included no quality control measures. For instance, one of the most basic quality control measures is to time how long it takes the respondent to complete the survey, in order to identify potential “racers” who are simply trying to complete the survey without regard to what it asks.⁴¹ Yet because the Wecker Survey was part of an omnibus survey, there was no attempt by either Dr. Wecker or the survey

³⁸ Ex. X, Lars Perner, Ph.D., Consumer Research Methods, http://www.consumerpsychologist.com/cb_Research_Methods.html (last visited November 10, 2014) (emphasis added), *see also* Ex. Y, AAPOR Report on Online Panels, 32, https://www.aapor.org/AM/Template.cfm?Section=AAPOR_Committee_and_Task_Force_Report_s&Template=/CM/ContentDisplay.cfm&ContentID=2223 (last visited November 10, 2014).

³⁹ Ex. Z, Keith Phillips, *Data Use: An evaluation of quality-control questions*, <http://www.quirks.com/articles/2013/20131205.aspx> (last visited Nov. 30, 2014).

⁴⁰ Ex. AA, Michael Richarme and Felicia Rogers, *The Honesty of Online Survey Respondents: Lessons Learned and Prescriptive Remedies*.

⁴¹ *Id.* at 4. Respondents were paid for taking the Wecker Survey. *See* Ex. L. This financial incentive coupled with the long length of the Survey only encourages to respondents to rush through the Wecker Survey.

1 administrator to identify potential “racers” for the Wecker Survey. All that the survey
 2 administrator tracked was the total time that respondents took to complete the entire omnibus
 3 survey. But Dr. Wecker does not even know how many other surveys were involved in the
 4 omnibus survey,⁴² and it is impossible to determine if any respondent raced through his survey.

5 Another type of quality control measure is to ask about either fictitious products, or to
 6 include “Harvard questions.” Harvard questions are designed to test whether respondents are
 7 actually reading and paying attention to the survey questions.⁴³ Dr. Wecker did neither of these
 8 things. When asked at deposition whether his survey included any quality control questions,
 9 Dr. Wecker identified only his question asking respondents whether they had used the Microsoft
 10 products in question.⁴⁴ But when pressed on this, and in particular whether there was any way to
 11 determine from the answer to that question whether the respondent was lying, Dr. Wecker
 12 conceded that there was not.⁴⁵ At minimum, this betrays a serious lack of understanding by
 13 Dr. Wecker as to what a quality control question even is. In any event, his failure to include any
 14 quality control measures in his survey is a clear departure from standard survey methodology, and
 15 for this reason as well the Wecker survey and Dr. Wecker’s testimony about it should be excluded.

16 **C. The Willingness-To-Pay (WTP) Results from the Wecker Survey Should Be**
 17 **Excluded Because There is No Basis for Using the Selected Calibration Factor**
or Any Other Calibration Factor

18 The Wecker Survey asked open-ended willingness-to-pay (WTP) questions.⁴⁶ Dr. Wecker
 19 acknowledges that the average responses to such questions will overestimate the true willingness-
 20 to-pay of the average consumer.⁴⁷ He purports to address this defect by applying a “calibration
 21 factor,” which Dr. Wecker says is equal to 1.46 (“Wecker Calibration Factor”). He then divides
 22

23 ⁴² Ex. K at 90:14-22.

24 ⁴³ See Ex. W at page 20. Dr. Colby provides the following example Harvard question in his
 25 report: People vary in the amount they pay attention to these kinds of surveys. Some take them
 26 seriously and read each question, while others go very quickly and barely read the questions at all.
 If you have read this question carefully, please write the word "Yes" in the blank "Other, please
 specify" box below. (1) Strongly agree; (2) Agree; (3) Somewhat agree, somewhat disagree; (4)
 Disagree; (5) Strongly disagree; 6 Other, please specify.

27 ⁴⁴ Ex. K at 92:11-93-3.

⁴⁵ Ex. K at 81:3-8.

⁴⁶ Ex. J at para. 13.

⁴⁷ Ex. J at para. 14.

1 the average WTP survey results by the Wecker Calibration Factor, ostensibly to correct for this
2 defect in the data.⁴⁸

3 Dr. Wecker did not conduct a study to ascertain the Wecker Calibration Factor. For
4 example, he did not compare the stated willingness to pay by the respondents in his survey with
5 any actual data showing a true willingness to pay for the features in question, dividing the two
6 come up with the Wecker Calibration Factor. He instead derived his calibration factor from a
7 2003 paper that in turn corrects manifest errors in a 2001 paper. Neither of these papers has
8 anything to do with computer software, let alone commercial productivity products such as those
9 found in the Office suites, let alone the use of background spell- and grammar-check features in
10 those products. Moreover, the papers on which Dr. Wecker relies concern the willingness to pay
11 for an entire product. None of the literature identified by Dr. Wecker says that there is any
12 validity to applying a calibration factor to respondents' stated willingness to pay for a single
13 feature of a product.

14 Moreover, the articles on which Dr. Wecker relies on their faces show that Dr. Wecker's
15 "calibration approach" is not a sound and accepted methodology in the survey field. Specifically,
16 Dr. Wecker derives the Wecker Calibration Factor from the data in a 2003 paper by Murphy et al,
17 entitled "Revisiting the Data and Estimation in List and Gallet" ("2003 Murphy Paper").⁴⁹ The
18 2003 Murphy Paper is a critique and revised analysis of data reported by List and Gallet in a 2001
19 paper entitled "What Experimental Protocol Influence Disparities Between Actual and
20 Hypothetical Stated Values" ("LG Paper").⁵⁰

21 The LG Paper is a meta-survey, taking data from 29 wide-ranging studies with 174
22 observations. Some of these 29 studies were field studies, while others were laboratory studies.
23 Some concerned private goods (*e.g.*, consumer goods), while others concerned public goods (*e.g.*,
24 public land use). None of these studies concerned computer software, or features of computer
25 software. Nor was there any convergence in the data reported by these surveys. Rather, these

26 ⁴⁸ See *id.*

27 ⁴⁹ See *id.*

28 ⁵⁰ Ex. AB, James J. Murphy et al., *Revisiting the Data and Estimation in List and Gallet (2000)* at page 1.

1 studies yielded calibration factors ranging from 0.8 to 28.2, demonstrating the significant
 2 influence that the nature of the studies have on the calibration factor. Given the small sample size
 3 of studies and the wide-ranging study parameters, the paper acknowledged that “[m]ore research is
 4 necessary. Undeniably, our results should only be considered a first attempt at quantifying the
 5 various experimental methods that may affect hypothetical bias.”⁵¹ The LG Paper further offered
 6 that “[a]t this early stage in the debate, we are comfortable with arguing that our results suggest
 7 that experimental procedures affect reported calibration functions in meaningful ways, *and any*
 8 *calibration exercise that seeks reliability will need to understand the important experimental*
 9 *protocol which induce biases.*”⁵² On its face, then, the LG Paper acknowledges that the results
 10 and methodology reported in the paper cannot, without more, be taken as reliable.

11 The 2003 Murphy Paper likewise concluded that the LG Paper calibration results were
 12 unreliable, in part, because of the small study sample size “with insufficient variation” forming the
 13 basis for the LG Paper.⁵³ The 2003 Murphy Paper did nothing to correct this deficiency, such as
 14 by expanding on the work reported in the LG Paper or by acquiring further data to validate the
 15 propositions set forth in that paper. Rather, the 2003 Murphy Paper merely re-states and re-
 16 presents the underlying data from the LG Paper.⁵⁴

17 The authors of the 2003 Murphy Paper published another paper two years later (“2005
 18 Murphy Paper”), in which they developed another model using an expanded data set.⁵⁵ However,
 19 Dr. Wecker elected not to base his opinions on this refined model with its expanded data set. In
 20 any event, even that more refined model falls far short of offering a sufficiently reliable
 21 methodology to comply with *Daubert*. That paper concludes that “there is no consensus about the
 22 underlying causes of hypothetical bias or ways to calibrate survey responses for it.”⁵⁶ And
 23 “[t]here is some weak evidence that bias increases when public goods are being valued, and that
 24

25 ⁵¹ Ex. AC, John A. List et al., *What Experimental Protocol Influence Disparities Between Actual*
 26 *and Hypothetical Stated Values*, Environmental and Resource Economics 241, 251.

26 ⁵² See *id.* (emphasis added).

27 ⁵³ Ex. AB at page 3.

27 ⁵⁴ See *id.* at page 5.

28 ⁵⁵ Ex. AD, James J. Murphy et al., *A Meta-Analysis of Hypothetical Bias in Stated Preference*
Valuation, Environmental and Resource Economics (2005) 313.

1 some calibration methods may be effective at reducing bias. However, results are quite sensitive
 2 to model specification, which will remain a problem until a comprehensive theory of hypothetical
 3 bias is developed.”⁵⁷ Indeed, the paper cautions that “[t]here is no theory explaining hypothetical
 4 bias that could provide guidance as to the appropriate model specification” for determining
 5 calibration factors.⁵⁸ Yet Dr. Wecker nonetheless embraces the work of the 2003 Murphy Paper
 6 by the same authorities as a mathematical certainty.⁵⁹

7 In short, the Wecker Calibration Factor is not based on a reliable methodology or sufficient
 8 data, and does not provide a reliable basis on which to adjust what Dr. Wecker concedes are
 9 overestimates of the respondents’ stated willingness-to-pay in the Wecker Survey. That portion of
 10 the Wecker Survey and Wecker Report, and Dr. Wecker’s testimony on it, should therefore be
 11 excluded.

12 **V. CONCLUSION**

13 The Wecker Report and Wecker Survey should be excluded for at least the reasons
 14 articulated above.

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Respectfully Submitted,

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26 ⁵⁶ Ex. AD at 313.

27 ⁵⁷ See *id.*

28 ⁵⁸ See *id.* at page 318.

⁵⁹ “[R]elying on calibration methods tends to be relevant primarily in the public section context where it is not necessarily practical to conduct a traditional market survey.” Ex. W at page 19.

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